Federal Court of Appeal  Cour d'appel fédérale

Date: 20161110

Docket: A-289-15

Citation: 2016 FCA 273

CORAM: **NOËL C.J.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

CHARBEL EL-HELOU

Appellant

and

COURTS ADMINISTRATION SERVICE, LAURENT FRANCOEUR, FRANCINE CÔTÉ, ERIC CLOUTIER, DAVID POWER, AND ÉRIC DELAGE

Respondents

Heard at Ottawa, Ontario, on September 28, 2016.

Judgment delivered at Ottawa, Ontario, on November 10, 2016.

REASONS FOR JUDGMENT BY: NOËL C.J.

CONCURRED IN BY: STRATAS J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

NOËL C.J.

[1] This is an appeal and a cross-appeal from a decision rendered by St-Louis J. (the Federal Court judge) allowing in part the application for judicial review filed by Charbel El-Helou (the appellant) (*Charbel El-Helou v. Canada (Courts Administration Service)*, 2015 FC 685) against a decision by the Public Sector Integrity Commissioner (the Commissioner) dismissing the

appellant's reprisal complaints filed pursuant to the *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46 (the PSDPA).

[2] The judgment rendered by the Federal Court judge in order to give effect to her reasons is central to the discussion which follows. For ease of reference, it is reproduced in Annex 1 to these reasons. The relevant provisions of the PSDPA are set out in Annex 2.

[3] The appellant and the individuals who are the subject matter of the complaints were, at all material times, employees of the Courts Administration Service (CAS), a government entity that provides administrative support to the Federal Court of Appeal, Federal Court, Tax Court of Canada and Court Martial Appeal Court of Canada. In the document setting out his complaints, the appellant says he witnessed improprieties by certain employees and disclosed them to his superior, Mr. Power, and suffered reprisals as a result of making the disclosures.

[4] At issue before the Federal Court judge was whether the Commissioner committed a reviewable error in dismissing the appellant's complaints that he suffered reprisals as a result of the disclosures. Also at issue was whether the Commissioner could reconsider a prior decision allowing a complaint to proceed before the Public Servants Disclosure Protection Tribunal (the Tribunal) and dismiss it, because of subsequently-obtained information. The Commissioner held that while the principle of *functus officio* did not allow him to dismiss that complaint, he was not prevented from taking, before the Tribunal, a position adverse to the appellant, consistent with this subsequently-obtained information.

[5] The Federal Court judge intervened on this last point, holding that the Commissioner was *functus officio* in all respects. In paragraph 1 of the judgment, she allowed the judicial review in part. In paragraph 2 of the judgment, she quashed the decision of the Commissioner to take a position before the Tribunal that was adverse to his original application. She otherwise upheld the decision of the Commissioner.

[6] For the reasons which follow, I would dismiss the appeal and I would allow the cross-appeal in part, striking paragraphs 1 and 2 of the Federal Court's judgment. Paragraph 2 must fall: while the Federal Court judge properly held that the Commissioner could no longer dismiss the complaint, she erred in holding that the principle of *functus officio* prevented him from altering his position before the Tribunal with respect to that complaint. Paragraph 1 must also fall: none of the grounds advanced in the notice of application against the Commissioner's decisions succeed. Thus, I would also dismiss the application for judicial review.

BACKGROUND

[7] This is the second decision by the Commissioner concerning the appellant's reprisal complaints (Reasons, para. 3). The Commissioner's first decision, rendered April 18, 2011 (the first decision), dismissed two complaints of reprisal and referred a third one to the Tribunal. The appellant's application for judicial review from that decision was allowed by Mactavish J. in *El-Helou v. Courts Administration Service*, 2012 FC 1111 (*El-Helou #1*).

[8] The complaints at issue in the first decision were that (Reasons, para. 23):

1. Mr. Francoeur asked Mr. Cloutier to obtain information about the appellant's management style, and solicited negative comments about him from his subordinates while Mr. Cloutier was temporarily acting for Mr. Francoeur;

2. Ms. Côté temporarily re-assigned the appellant to other duties and removed his supervisory responsibilities; and

3. Mr. Delage withheld the appellant's Top Secret security clearance.

[9] During the initial investigation, two additional complaints were brought to the attention of the investigator (Appeal Book, vol. I, p. 56). Although she did recommend that Mr. Power be added as an alleged reprisor, these additional complaints were not made part of the investigator's report (*Ibidem*).

[10] By the first decision, the Commissioner dismissed complaints #1 and #2, but referred the third one to the Tribunal. He did so on May 16, 2011 by filing an application pursuant to paragraph 20.4(1)(*b*) of the PSDPA after having added the name of Mr. Power to that of Mr. Delage as a target of this third complaint. The application filed by the Commissioner sought a remedy in favour of the appellant and an order that disciplinary action be taken against Mr. Power and Mr. Delage.

[11] The appellant brought a judicial review application against the Commissioner's first decision, insofar as it dismissed the first two complaints. This application was disposed of in *El-Helou #1*. By that decision, Mactavish J. held that there had been a breach of procedural fairness, namely that the appellant was "never made aware of the substance of the evidence that had been obtained by the [first] investigator" (*El-Helou #1*, para. 77). She also determined that the

investigation was not thorough because the investigator did not investigate crucial evidence and a threat of additional security examination of the appellant (*El-Helou #1*, paras. 84-86 and 91-95). Her judgment set aside of the Commissioner's first decision and remitted the matter back for additional investigation in accordance with her reasons (*El-Helou #1*, Judgment, para. 1).

[12] This further investigation was conducted by a different investigator (the second investigator). By letter dated January 30, 2013, the second investigator advised the appellant that she would consider the information that the first investigator had collected in addition to the facts that she would gather as they relate to the following complaints (Appeal Book, vol. I, p. 270):

1. Mr. Cloutier was directed by Mr. Francoeur to solicit employees for the purposes of securing negative information about the appellant;
2. Ms. Côté temporarily re-assigned the appellant and removed his supervisory responsibilities
3. Mr. Delage and Mr. Power withheld the appellant's Top Secret security clearance;
4. The appellant was asked to acknowledge having committed a security breach in order to obtain a professional reference from Mr. Power; and
5. The appellant was asked to acknowledge having committed a security breach in order to prevent a security investigation from occurring.

[13] Complaint #3 was included as a subject matter of the second investigation against the appellant's objection. In a letter dated January 21, 2013 addressed to the second investigator, the appellant took the position that it would be inappropriate for the Commissioner to reconsider or otherwise reinvestigate that complaint, given that it had already been referred to the Tribunal (Appeal Book, vol. I, p. 258).

[14] The second investigator produced a lengthy preliminary report. This time around, the appellant had the opportunity to comment on the preliminary report. Due to the extensive nature of the appellant's comments, the Commissioner requested that the second investigator provide comments on them. The appellant was not made aware of this internal process nor was he provided with the opportunity to review and respond to the second investigator's comments. The investigator then issued a final report, which in large part duplicated her preliminary report.

[15] The second investigator found no evidence that the alleged reprisors were aware of the protected disclosures other than Mr. Power to whom the disclosures had been made. She stressed that "[t]he information gathered during the course of the investigation revealed nothing to suggest that Mr. Francoeur, Mr. Cloutier, Mr. Delage or Ms. Côté were in fact aware of any such disclosures" (Appeal Book, vol. I, p. 327). As a result, the second investigator concluded that complaints #1, #2, and #5, insofar as they were made against those individuals, could not have given rise to reprisals for the purpose of the PSDPA.

[16] The second investigator further stated that the complaints were either unfounded or explained by other factors. With respect to complaint #1, the evidence did not support the allegation that Mr. Cloutier had canvassed employees and solicited them for negative comments. The employees had come forth on their own volition (Appeal Book, vol. II, p. 472). As for complaint #2, both the appellant and Mr. Francoeur were reassigned from their positions as part of an investigation of harassment (Appeal Book, vol. II, p. 473). The report also noted that complaint #5 had to be considered in light of the broader context relating to CAS's responsibility

for insuring compliance with policies on government security (Appeal Book, vol. II, pp. 463-467; Reasons, para. 20).

[17] Despite Mr. Power possessing knowledge of the protected disclosures, the information gathered during the investigation revealed nothing to suggest that either of complaints #3 or #4 gave rise to reasonable grounds to believe that a reprisal had occurred (Appeal Book, vol. II, pp. 485-486). In revisiting complaint #3, the second investigator suggested that not all of the information had been taken into account by the first investigator and that, based on the information available to her, the Commissioner should not have placed complaint #3 before the Tribunal (Appeal Book, vol. I, pp. 331-334). The second investigator recommended that the Commissioner either file a request to withdraw the pending application or accept that the Tribunal was seized of it and amend the statement of particulars and the notice of application that had been filed with the Tribunal to reflect the current position (Appeal Book, vol. I, p. 344).

[18] The decision rendered by the Commissioner as a result of this second investigation is at the root of the present appeal (the second decision). By that decision, rendered on August 23, 2013, the Commissioner dismissed complaints #1, #2, #4, and #5, noting essentially that the allegations were unfounded or that the person responsible for the measures taken had no knowledge of the protected disclosures, and that Mr. Power, who had this knowledge, had no involvement in the measures taken.

[19] As to complaint #3, the Commissioner adopted the alternative course of action proposed by the second investigator. He recognized that insofar as this complaint was concerned, he was

functus officio pursuant to section 20.5 of the PSDPA, given that the Tribunal was seized of it. He noted, however, that section 21.6 required of him, in proceedings before the Tribunal, to take the position that is in the public interest. In light of the new, more thorough investigation, the Commissioner stated that he no longer supported the complainant's allegation of reprisal insofar as it relates to complaint #3 and so he no longer intended to seek from the Tribunal the remedy sought in the application on the appellant's behalf. In light of this, he asked for certain directions from the Tribunal (Appeal Book, vol. II, pp. 421-422):

> Subsection 21.6 of the *Act* requires me to adopt in proceedings before the Tribunal the position that is in the public interest having regard to the nature of the complaint. This duty includes informing the Tribunal and the parties of any new facts or circumstances that are relevant to the proceedings. By this letter, I hereby give notice to the parties that I no longer support the Complainant's allegation that he suffered reprisals and that I do not intend to seek a remedy for the Complainant or a disciplinary sanction against the two individuals named in the Application. It would be contrary to the public interest for me to pursue this allegation before the tribunal when the evidence does not support it.
>
> Considering the Tribunal's decision of November 23, 2012 [in which the Tribunal suspended the proceedings], the Tribunal still has jurisdiction over the matter and for this reason, I believe that my authority to dismiss this allegation pursuant to section 20.5 of the *Act* is *functus officio*. Accordingly, I seek directions from the Tribunal on the next steps that may be necessary, including on my ability to withdraw the Notice of Application or on any other process that may be required to address this significant change in circumstances.

[20] In response, the Tribunal issued a direction requesting the Commissioner to file a motion setting out the relief requested (Appeal Book, vol. II, p. 523), but in the interim, the appellant brought a judicial review application against the Commissioner's second decision, taking issue both with the dismissal of complaints #1, #2, #4, and #5, and his decision to withdraw his support with respect to the pending application pertaining to complaint #3. On this last point, the appellant took the position that the Commissioner was bound to pursue the position set out in the application as it was filed (application for judicial review, Appeal Book, vol. I, p. 42, para. (b)).

The proceedings before the Tribunal, including the Tribunal's invitation to the Commissioner to file a motion, have been suspended pending the outcome of the present proceedings.

FEDERAL COURT DECISION

[21] In the course of her analysis, the Federal Court judge identified three issues (Reasons, para. 43): did the Commissioner err in law in reconsidering his decision to refer complaint #3 to the Tribunal for adjudication; did the Commissioner arrive at his decision in breach of the rules of procedural fairness; and did the Commissioner err in law by failing to properly interpret and apply the PSDPA or the relevant principles concerning the law of reprisals?

[22] As to the applicable standard of review, the Federal Court judge determined that correctness applied to both the interpretation of *functus officio* principles (Reasons, para. 45) and to considerations of procedural fairness (Reasons, para. 46). The Federal Court judge also noted that deference was owed with respect of the choice of procedure (Reasons, para. 46). Finally, reasonableness was to be applied to the Commissioner's interpretation and application of the PSDPA (Reasons, para. 47).

[23] Dealing with the first issue, the Federal Court judge concluded that because *El-Helou #1* left the Commissioner's referral of complaint #3 to the Tribunal untouched, "the Commissioner was indeed *functus officio*, and failing an order from [the Federal Court], had no authority to revisit its finding" (Reasons, para. 63).

[24] Relying on the Alberta Court of Appeal decision in *Schuchuk v. Alberta (Workers' Compensation Board)*, 2012 ABCA 50, the Federal Court judge held that the Commissioner had no authority to re-screen the complaint and remained bound by his first decision. She thus rejected the respondents' argument that the Commissioner retained the authority to reconsider the matter (Reasons, para. 63).

[25] The judgment that she gave on this point sets aside the Commissioner's conclusion according to which he was not *functus officio* under section 21.6 with respect to complaint #3. Although the Federal Court judge does not address this question, paragraphs 1 and 2 of her judgment can only be read as overturning this aspect of the Commissioner's decision as she otherwise agreed that he was *functus officio* pursuant to section 20.5 (Reasons, para. 63).

[26] Turning to complaints #1, #2, #4, and #5, the Federal Court judge rejected the appellant's contention that there had been a breach of procedural fairness in the process which led to their dismissal. She recalled that in *El-Helou #1*, Mactavish J. identified the issues that needed to be addressed in order to remedy the earlier flaws. She went on to hold that the second investigator addressed them all (Reasons, para. 67).

[27] The Federal Court judge also rejected the appellant's argument that the second investigator's response to his own comments had to be communicated to him and that the failure to do so had given rise to a further breach of procedural fairness. Relying *on IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, 68 D.L.R. (4th) 524, the Federal Court judge explained that, as the second investigator's response revealed no new fact or

argument, no breach was committed. She explained that notwithstanding the second investigator's response, the substance of the case remained unchanged and, therefore, the applicant's right to comment on the substance of the case had been fulfilled (Reasons, paras. 68-69).

[28] The Federal Court judge also rejected the appellant's argument that procedural fairness required that he be provided with a full summary of the evidence in the hands of the investigator (Reasons, para. 70); he had been given enough to address the substance of the case at this stage. She also dismissed the appellant's argument that the second investigator had not been neutral and thorough (Reasons, para. 72).

[29] Finally, the Federal Court judge was unable to detect a reviewable error in the Commissioner's conclusion that there were no reasonable grounds to believe that reprisals were taken against the appellant. Except for Mr. Power, none of the individuals knew about the protected disclosures such that the measures complained of could not have occurred by reason of the protected disclosures (Reasons, paras. 75-76). As for Mr. Power, the Federal Court judge made no explicit finding. However, because the Federal Court judge did not take issue with the Commissioner's decision dismissing the allegation made against him, it must be assumed that she found no reviewable error in the second investigator's reasoning on this point.

POSITION OF THE PARTIES

[30] The respondents take a common position on both the appeal and the cross-appeal, the individual respondents adopting the memorandum of fact and law of CAS on the appeal, and

CAS adopting the memorandum of fact and law filed by the individual respondents on the cross-appeal.

- *The appeal*

[31] The appellant agrees with the Federal Court judge's determination of the applicable standard of review while insisting that a dismissal of a reprisal complaint, as opposed to a decision to refer the matter to the Tribunal, should be scrutinized more intensely given the greater impact of a dismissal on the rights of the appellant (appellant's memorandum of fact and law, paras. 28-30).

[32] In support of his appeal, the appellant reiterates the position that he took before the Federal Court judge and asserts that the failure to give him the opportunity to respond to the investigator's response to his own comments resulted in a further breach of procedural fairness (appellant's memorandum of fact and law, paras. 31-50). The appellant further argues that he was not provided with sufficient information with respect to the witness statements (appellant's memorandum of fact and law, paras. 51-55); that the investigation lacked thoroughness because the investigator failed to assess circumstantial evidence and did not take a hard look at the evidence; and that the investigation was not neutral because the second investigator assessed his credibility without assessing the credibility of others and argued against him in her response to his comments (appellant's memorandum of fact and law, paras. 56-67).

[33] Finally, the appellant contends that the second investigator, and by extension the Commissioner, applied the wrong test in determining whether the existence of reprisal had been

established. He maintains that the test pursuant to section 20.4(3) of the PSDPA should be whether there is "some basis" to support the allegations of reprisal (appellant's memorandum of fact and law, para. 63).

[34] In their response, the respondents do not dispute that procedural fairness requires informing the complainant of the substance of the case and providing him with an opportunity to comment on it. They argue, however, that this requirement was met when the preliminary report was provided to the appellant for comments (CAS's memorandum of fact and law, paras. 7-9). In so stating, the respondents stress that the second investigator's response added no fact or argument, and merely reiterated what was said in her preliminary report (CAS's memorandum of fact and law, para. 15).

[35] The respondents further submit that the law did not require the investigator or the Commissioner to provide the appellant with witness summaries or to make express findings of credibility. The respondents point out that the Commissioner took a hard look at the evidence and that mere contradictory evidence does not trigger a referral to the Tribunal (CAS's memorandum of fact and law, paras. 27-36).

- *The cross-appeal*

[36] In their cross-appeal, the respondents challenge the Federal Court judge's conclusion that the Commissioner was *functus officio* and, as a result, could not dismiss complaint #3. They first contend that *El-Helou #1* had the effect of setting aside the Commissioner's first decision in its entirety, including the referral of complaint #3 to the Tribunal. It follows that the Commissioner

had to revisit this complaint regardless of any other consideration (memorandum of fact and law of the respondents/appellants by cross-appeal, para. 28).

[37] The respondents further argue that even if *El-Helou #1* did not set aside the Commissioner's first decision insofar as it relates to complaint #3, the doctrine of *functus officio* did not prevent the Commissioner from reconsidering this decision in light of the change in circumstances. They submit that the Commissioner misconstrued the doctrine of *functus officio* in reaching the conclusion that the present case did not come within one of the established exceptions (memorandum of fact and law of the respondents/appellants by cross-appeal, paras. 52-55, quoting *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577 [*Chandler*] and *Chopra v. Canada (Attorney General)*, 2013 FC 644, paras. 64-66).

[38] Indeed, according to the respondents, it can be seen from *El-Helou #1* that the whole of the Commissioner's decision was vitiated by the lack of procedural fairness. The result is that the Commissioner's decision to file an application before the Tribunal with respect to complaint #3 was null and void, thereby authorizing the Commissioner to make a fresh decision (memorandum of fact and law of the respondents/appellants by cross-appeal, para. 60).

[39] In response to the cross-appeal, the appellant maintains that *El-Helou #1* only dealt with complaints #1 and #2, since these were the only two that were the subject of the notice of application for judicial review in *El-Helou #1*. The appellant adds that nothing said by Mactavish J. in her reasons in *El-Helou #1* alters that view (memorandum of fact and law of the

appellant/respondent by cross-appeal, para. 26). It follows that this decision *El Helou* #1 provides no authority for reconsidering complaint #3.

[40] Furthermore, according to the appellant, the Federal Court judge correctly held that none of the exceptions to the doctrine *functus officio* allowed the Commissioner to dismiss the complaint (memorandum of fact and law of the appellant/respondent by cross-appeal, paras. 34-36). Even if the Commissioner decided not to participate in the proceedings before the Tribunal as a result of the additional information which he obtained, it remains that the appellant has an independent right to pursue that application on his own terms (memorandum of fact and law of the appellant/respondent by cross-appeal, para. 38).

[41] Finally, the appellant supports the Federal Court judge's conclusion that the Commissioner was *functus officio* in all respects. Specifically, the appellant contends that the Commissioner's view that section 21.6 of the PSDPA allowed him to take a different position in the pending application before the Tribunal is incorrect. The Commissioner had no authority to investigate complaint #3 further since the Tribunal was already seized of it (memorandum of fact and law of the appellant/respondent by cross-appeal, paras. 39 and 40).

ANALYSIS AND DISPOSITION

[42] The standard of review of a final decision by the Federal Court on a judicial review is set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 [*Agraira*]. This Court must determine whether the judge selected the appropriate standard of review for each issue and whether this standard was correctly applied. In effect, the

appellate court steps into the shoes of the lower court to focus solely on the administrative decision (*Agraira*, para. 46).

- *The appeal*

[43] Although there is currently some uncertainty concerning the standard of review for procedural fairness (*Bergeron v. Canada (Attorney General)*, 2015 FCA 160, paras. 67-71; *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502, paras. 79 and 89), it is not necessary to resolve it here. I am prepared in this case to review the procedural fairness issues on the standard most generous to the appellant, that of correctness.

[44] As for all remaining issues, it is well established that in the absence of an extricable question of law, mixed questions of fact and law attract a review under the reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, para. 47 [*Dunsmuir*]).

[45] The resolution of the appeal requires the Court to determine whether the appellant was afforded procedural fairness in the process which led to the Commissioner's second decision and whether the Commissioner's second decision, to dismiss complaints #1, #2, #4, and #5, was reasonable.

[46] Turning to the first question, no one takes issue with the fact that Mactavish J. in *El-Helou #1* properly identified the breaches of procedural fairness which occurred during the first investigation. The issue therefore becomes whether these initial shortfalls were remedied by second investigation that led to the second decision, and if so, whether the additional procedural

breaches alleged to have taken place during the course of this second investigation provide grounds for setting aside the second decision.

[47] In this respect, the appellant correctly asserts that he had to be informed of the substance of the case to be met in order to allow him to provide a full response (*Paul v. Canadian Broadcasting Corp*, 2001 FCA 93, 198 D.L.R. (4th) 633, para. 43). He maintains that he was not given this opportunity because he was not provided with the second investigator's response to his own comments.

[48] In my view, the Federal Court judge correctly held that the disclosure of the preliminary report allowed the appellant to know the case which he had to meet (Reasons, paras. 69-70). The second investigator's response neither added to, nor modified, the substance of the case contained in the preliminary report. Although the second investigator was given the last word, I agree with the Federal Court judge that no unfairness resulted from this given the content of the second response.

[49] I am no more persuaded by the appellant's argument that he should have been provided with witness summaries. As noted by Mactavish J. in *El-Helou #1*, the disclosure of witness summaries is an alternative to the disclosure of the investigator's report and this report was as complete as can be (*El-Helou #1*, para. 76).

[50] Further, in my view, the second investigation was both neutral and thorough. The second investigator explicitly undertook to remedy the procedural flaws identified by Mactavish J. She

reviewed the evidence gathered by the first investigator, conducted further interviews, reconsidered all the complaints, and came to her own conclusions based on the evidence. While it is clearly a source of frustration for the appellant that the second investigation did not assist in furthering his claim of reprisal, I can find no procedural flaw in the manner in which it was conducted.

[51] The second issue underlying the appeal is whether the dismissal of all the complaints, with the exception of the one which had been referred to the Tribunal (complaint #3), was reasonable.

[52] In determining whether a complaint should be dismissed or pursued before the Tribunal, the Commissioner must determine whether reasonable grounds exist for believing that a measure was taken against a complainant as a result of a protected disclosure. Under section 2 of the PSDPA, a "reprisal" is defined as measures "taken against a public servant because the public servant has made a protected disclosure". It follows that there must be a connection between the protected disclosure and the alleged measures before a measure can be viewed as a reprisal.

[53] While the Commissioner acknowledged that his "task is not to determine whether or not the reprisals are proven", the evidence gathered during the investigation showed that none of alleged reprisors, with the exception of Mr. Power, knew of the protected disclosures (Appeal Book, vol. I, pp. 59-60). While the appellant questions the Commissioner's acceptance of the respondents' evidence in arriving at this conclusion, given that they were responding to damaging allegations, the second investigator was mindful of their self-interest in gauging their

response. It was reasonable for the Commissioner to hold on this evidence that there was no nexus between the disclosures to Mr. Power and the individual respondents' conduct and so complaints #1, #2, and #5 had to be dismissed.

[54] It was also open to the Commissioner to find that the evidence fell short of establishing that the measure impugned in complaint #4 was related to the protected disclosures. Specifically, the evidence which he found to be probative revealed that Mr. Power was under no obligation to provide the appellant with a reference and that no promise had been made in that regard (Appeal Book, vol. II, p. 477).

[55] In my view, the Federal Court judge properly concluded that the Commissioner's dismissal of complaints #1, #2, #4, and #5 was reasonable.

- *The cross-appeal*

[56] The respondents' contention in support of the cross-appeal is that both the Federal Court judge and the Commissioner erred in concluding that the doctrine of *functus officio* had any application in this case. This error is first said to arise from a misconstruction of Mactavish J.'s decision in *El-Helou #1*. Contrary to what they understood, *El-Helou #1* overturned the Commissioner's first decision in its entirety so that the Commissioner was bound to make a fresh determination with respect to all complaints, including complaint #3.

[57] This argument turns on the legal effect of Mactavish J.'s judgment in *El-Helou #1*. The determination of the legal effect of a judgment gives rise to a legal question, which is best

addressed by the Court which rendered the decision. The Federal Court judge found that the legal effect of Mactavish J.'s judgment was limited to complaints #1 and #2. I see no reason to disturb this finding.

[58] In so holding, I need only refer to paragraph 2 of the reasons of Mactavish J. in *El-Helou #1* which confirms this understanding and to the wording of the notice of application as it was filed before the Federal Court in that case (*El-Helou #1*, Federal Court, File No. T-862-11). The wording of the notice of application is as follows:

> This is an application for judicial review in respect of the decision of the Public Sector Integrity Commissioner (made by Interim Commissioner Mario Dion) made pursuant to section 20.5 of the *Public Servants Disclosure Protection Act* (PSIC File No. 2009-R-607) on April 18, 2011 and received by the Applicant on April 19, 2011.
>
> The decision concerned complaints of reprisal filed by the Applicant in accordance with the *Public Servants Disclosure Protection Act*. These complaints contained three allegations of reprisal against employees of the Courts Administration Service who are the named Respondents in this application. By the decision dated April 18, 2011, the Commissioner decided to refer one aspect of the Applicant's reprisal complaint to the Public Servants Disclosure Protection Tribunal. However, two allegations raised by the Application were dismissed by that decision. <u>The decision to dismiss these two allegations is the subject matter of this application for judicial review.</u> [Emphasis added]

[59] The judgment of Mactavish J. provides in turn: "the application for judicial review is allowed" and "the April 18, 2011 decision is set aside…" (*El-Helou #1*, para. 104).

[60] This judgment when read in the light of the notice of application leaves no ambiguity as to its ambit. The respondents nevertheless point to paragraph 90 of the reasons in *El-Helou #1* (memorandum of fact and law of the respondents/appellants by cross-appeal, paras. 45 and 57) which, in their view, contemplates complaint #3 (*El-Helou #1*, para. 90):

> I note that the evidence of the former Chief Administrator of CAS was relevant to the issue of the alleged withholding of Mr. El-Helou's Top Secret security clearance. Given that this issue has been referred to the Tribunal for a hearing, the prejudice to Mr. El-Helou in this regard was limited, but was not entirely eliminated in that Mr. El-Helou does not have the benefit of notes or a transcript of an interview with the former Chief Administrator as he heads into the Tribunal hearing.

[61] I agree that this paragraph speaks to complaint #3. However, in making this statement, Mactavish J. was merely saying that because complaint #3 – in contrast with complaints #1 and #2 – had been referred to the Tribunal, the prejudice suffered by the appellant as a result of the flaws that she identified was more limited. It remained however that the appellant might yet benefit from the disclosure which she ordered "as he heads into the Tribunal hearing" (*El-Helou #1*, para. 90). These last words leave no doubt about the scope of Mactavish J.'s decision. Although of the view that the further investigation might assist the appellant by elucidating facts relevant to complaint #3, she left untouched the Commissioner's decision allowing this allegation to be adjudicated by the Tribunal.

[62] The remaining issue on the cross-appeal is whether the Commissioner could alter his earlier decision with respect to complaint #3, based on the new information revealed by the second investigation.

[63] It is generally accepted that the question whether a decision-maker has properly identified the *functus officio* principle, and the applicable test, as set out by the Supreme Court in *Chandler*, is reviewable on a standard of correctness (*Canadian Association of Film Distributors and Exporters v. Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc.*, 2014 FCA 235, 378 D.L.R. (4th) 72, para. 58).

[64] Once identified, a different standard may be called into play in ascertaining whether the test was properly applied (*Capital District Health Authority v. Nova Scotia Government and General Employees Union*, 2006 NSCA 85, 271 D.L.R. (4th) 156, paras. 42; *Elsipogtog First Nation v. Peters*, 2012 FC 398, 407 F.T.R. 213, paras. 32-34; *Canada (Attorney General) v. Canadian Human Rights Tribunal*, 2013 FC 921, paras. 35-37). If the decision is largely fact-based, the standard is likely to be reasonableness (*Dunsmuir*, para. 53).

[65] In *Chandler*, the Supreme Court recognized that when an administrative tribunal renders a final decision in accordance with its enabling statute, "that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances" (*Chandler*, para. 21). The Court also recognized that an administrative tribunal is not *functus officio* if it is authorized by statute to revisit an earlier decision (*Chandler*, para. 22).

[66] In this case, the Commissioner's identification and application of the *functus officio* principles led him to hold that his authority to dismiss complaint #3 pursuant to section 20.5 was exhausted, but that he was nevertheless authorized to adopt before the Tribunal a position contrary to the application which he filed, pursuant to section 21.6.

[67] Both parties take issue with this conclusion, the respondents arguing that the Commissioner retained his authority to dismiss the complaint pursuant to section 20.5, and the appellant asserting that he was *functus officio* as to both sections 20.5 and 21.6.

[68] Turning first to section 20.5, the respondents argue that the Commissioner misconstrued the applicable principles when he held that his authority to dismiss complaint #3 was exhausted. In this respect, the Commissioner held, and the Federal Court judge agreed, that none of the *Chandler* exceptions applied.

[69] Like the Federal Court judge, I can detect no error in the Commissioner's conclusion. Once confronted with a complaint, the Commissioner must either dismiss it pursuant to section 20.5, or allow it to proceed before the Tribunal pursuant to section 20.4.

[70] The Commissioner decided against the dismissal of complaint #3. In reaching this conclusion, no slip or error of the type described in *Chandler* was committed and I do not believe that the PSDPA can be construed so as to allow the Commissioner to dismiss a complaint which has been approved. If anything, the PSDPA points the other way. As the Commissioner intimated, an application, once filed before the Tribunal, no longer belongs to him. Subsection 21.6(1) makes it clear that, from that moment on, a complainant acquires an independent right to pursue the application on his or her own terms.

[71] It follows that even though the Commissioner no longer believes that the appellant is entitled to the remedy claimed, he does not have the power to dismiss the complaint. Only the Tribunal retains the authority to deal with it, after hearing all the parties concerned. In this respect, the Commissioner's revised position is no more determinative of the outcome before the Tribunal than was his support for the application at the time he filed it before the Tribunal.

[72] Turning to section 21.6, the Commissioner proceeded on proper principle when he asked whether this provision authorized him to change his stance and adopt a position against the application that he filed. In holding that it did, the Commissioner was construing his home statute. In my view, reasonableness is the standard against which this aspect of the Commissioner's decision is to be reviewed (*Dunsmuir*, para. 54; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, para. 34).

[73] Subsection 21.6(2) requires the Commissioner to "adopt the position that, in his or her opinion, is in the public interest". In my view, it was reasonable for the Commissioner to hold that he could adopt a position adverse to the application that he had filed if, in his opinion, the circumstances no longer supported the granting of a remedy in the public interest. Looking at the matter the other way, the Commissioner would be acting against the public interest if he were to support a complaint of reprisal even though he was of the view that no reprisal had taken place. It was therefore open to the Commissioner to reconsider his initial position and to adopt one before the Tribunal that is consistent with the facts revealed by the second investigation.

[74] The appellant challenged this conclusion on numerous grounds before the Federal Court (application for judicial review, Appeal Book, vol. I, pp. 42-43, paras. (b) and (c)). However, the only ground advanced on appeal insofar as section 21.6 is concerned is that the information which led the Commissioner to change his position was gathered after complaint #3 became the subject matter of an application. The suggestion is that because the Commissioner's screening functions were exhausted, it would be inappropriate for the Commissioner to rely on this

information (memorandum of fact and law of the appellant/respondent by cross-appeal, para. 39).

[75] I accept that, as a general rule, the Commissioner should not allow a complaint that has been referred to the Tribunal to be investigated further. However, I do not believe that this renders the Commissioner's decision unreasonable on the facts of this case.

[76] While as noted earlier, the appellant did object to complaint #3 being further investigated, he could not object to the investigation of the other complaints as they emanated from him. Given the extent to which they are intertwined, I do not see how these complaints could be investigated without eliciting information relevant to complaint #3. This is what Mactavish J. had in mind in *El-Helou #1* when she suggested that the further investigation that she ordered – specifically the interview of the former Chief Administrator of CAS – could impact the outcome of complaint #3 even if it was no longer in the hands of the Commissioner (*El-Helou #1*, para. 90).

[77] Given the ongoing investigation into the other complaints, there is no principled reason by which the Commissioner should have turned a blind eye to the new information gathered in the course of the second investigation.

[78] It was therefore reasonable for the Commissioner to rely on this new information when deciding under section 21.6 to adopt a position before the Tribunal that is adverse to the

application that he had filed and to amend the statement of particulars to reflect his current position.

DISPOSITION

[79] For these reasons, I would dismiss the appeal and allow the cross-appeal in part. Rendering the judgment which the Federal Court judge ought to have rendered, I would strike paragraph 1 of her judgment and replace it by a new paragraph reading: "1. The application for judicial review is dismissed;" I would strike paragraph 2 and renumber the remaining paragraphs in the order in which they appear. Like the Federal Court judge did in the matter before her, I would direct that the parties assume their respective costs on the appeal.

"Marc Noël"
Chief Justice

"I agree
David Stratas J.A."
"I agree
D.G. Near J.A."

ANNEX 1

THE COURT JUDGMENT is that:

1. The application for judicial review is allowed in part;
2. The decision of the Public Sector Integrity Commissioner pertaining to the allegation already referred to the Public Servants Disclosure Protection Tribunal is quashed;
3. The Public Servants Disclosure Protection Tribunal must adjudicate on the allegation referred by the Public Sector Integrity Commissioner following the May 16, 2011 Notice of Application;
4. The matter is not remitted to the Public Sector Integrity Commissioner;
5. The decision of the Public Sector Integrity Commissioner to dismiss the other allegations is upheld; and
6. Each party supports his costs.

ANNEX 2

***Public Servants Disclosure Protection Act*, S.C. 2005, c. 46.**	***Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*, L.C. 2005, ch. 46.**
Interpretation	**Définitions**
Definitions	**Définitions**
2 (1) The following definitions apply in this Act.	**2 (1)** Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
protected disclosure means a disclosure that is made in good faith and that is made by a public servant	**divulgation protégée** Divulgation qui est faite de bonne foi par un fonctionnaire, selon le cas:
(a) in accordance with this Act;	**a)** en vertu de la présente loi;
(b) in the course of a parliamentary proceeding;	**b)** dans le cadre d'une procédure parlementaire;
(c) in the course of a procedure established under any other Act of Parliament; or	**c)** sous le régime d'une autre loi fédérale;
(d) when lawfully required to do so. (divulgation protégée)	**d)** lorsque la loi l'y oblige. (protected disclosure)
…	[…]
reprisal means any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:	**représailles** L'une ou l'autre des mesures ci-après prises à l'encontre d'un fonctionnaire pour le motif qu'il a fait une divulgation protégée ou pour le motif qu'il a collaboré de bonne foi à une enquête menée sur une divulgation ou commencée au titre de l'article 33:
(a) a disciplinary measure;	**a)** toute sanction disciplinaire;
(b) the demotion of the public servant;	**b)** la rétrogradation du fonctionnaire;
(c) the termination of employment of the public servant, including, in the	**c)** son licenciement et, s'agissant d'un membre de la Gendarmerie royale du

case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;

Canada, son renvoi ou congédiement;

(d) any measure that adversely affects the employment or working conditions of the public servant; and

d) toute mesure portant atteinte à son emploi ou à ses conditions de travail;

(e) a threat to take any of the measures referred to in any of paragraphs (a) to (d). (représailles)

e) toute menace à cet égard. (reprisal)

…

[…]

Complaints

Plainte

19.1 (1) A public servant or a former public servant who has reasonable grounds for believing that a reprisal has been taken against him or her may file with the Commissioner a complaint in a form acceptable to the Commissioner. The complaint may also be filed by a person designated by the public servant or former public servant for the purpose.

19.1 (1) Le fonctionnaire ou l'ancien fonctionnaire qui a des motifs raisonnables de croire qu'il a été victime de représailles peut déposer une plainte auprès du commissaire en une forme acceptable pour ce dernier; la plainte peut également être déposée par la personne qu'il désigne à cette fin.

…

[…]

Refusal to deal with complaint

Irrecevabilité

19.3 (1) The Commissioner may refuse to deal with a complaint if he or she is of the opinion that

19.3 (1) Le commissaire peut refuser de statuer sur une plainte s'il l'estime irrecevable pour un des motifs suivants:

(a) the subject-matter of the complaint has been adequately dealt with, or could more appropriately be dealt with, according to a procedure provided for under an Act of Parliament, other than this Act, or a collective agreement;

a) l'objet de la plainte a été instruit comme il se doit dans le cadre d'une procédure prévue par toute autre loi fédérale ou toute convention collective ou aurait avantage à l'être;

(b) if the complainant is a member or former member of the Royal Canadian Mounted Police, the subject-matter of the complaint has

b) en ce qui concerne tout membre ou ancien membre de la Gendarmerie royale du Canada, l'objet de la plainte a été instruit comme il se doit dans le

been adequately dealt with by the procedures referred to in subsection 19.1(5);	cadre des recours visés au paragraphe 19.1(5);
(c) the complaint is beyond the jurisdiction of the Commissioner; or	**c)** la plainte déborde sa compétence;
(d) the complaint was not made in good faith.	**d)** elle n'est pas faite de bonne foi.
…	[…]
Decision After Investigation	**Décision suivant l'enquête**
Investigator's report to Commissioner	**Rapport de l'enquêteur**
20.3 As soon as possible after the conclusion of the investigation, the investigator must submit a report of his or her findings to the Commissioner.	**20.3** L'enquêteur présente son rapport au commissaire le plus tôt possible après la fin de l'enquête.
…	[…]
Application to Tribunal	**Demande présentée au Tribunal**
20.4 (1) If, after receipt of the report, the Commissioner is of the opinion that an application to the Tribunal in relation to the complaint is warranted, the Commissioner may apply to the Tribunal for a determination of whether or not a reprisal was taken against the complainant and, if the Tribunal determines that a reprisal was taken, for	**20.4 (1)** Si, après réception du rapport d'enquête, le commissaire est d'avis que l'instruction de la plainte par le Tribunal est justifiée, il peut lui demander de décider si des représailles ont été exercées à l'égard du plaignant et, le cas échéant:
(a) an order respecting a remedy in favour of the complainant; or	**a)** soit d'ordonner la prise des mesures de réparation à l'égard du plaignant;
(b) an order respecting a remedy in favour of the complainant and an order respecting disciplinary action against any person or persons identified by the Commissioner in the application as being the person or	**b)** soit d'ordonner la prise des mesures de réparation à l'égard du plaignant et la prise de sanctions disciplinaires à l'encontre de la personne ou des personnes identifiées dans la demande comme étant celles

persons who took the reprisal.

Exception

(2) The order respecting disciplinary action referred in paragraph (1)(b) may not be applied for in relation to a complaint the filing of which is permitted by section 19.2.

Factors

(3) In considering whether making an application to the Tribunal is warranted, the Commissioner must take into account whether

(a) there are reasonable grounds for believing that a reprisal was taken against the complainant;

(b) the investigation into the complaint could not be completed because of lack of cooperation on the part of one or more chief executives or public servants;

(c) the complaint should be dismissed on any ground mentioned in paragraphs 19.3(1)(a) to (d); and

(d) having regard to all the circumstances relating to the complaint, it is in the public interest to make an application to the Tribunal.

Dismissal of complaints

20.5 If, after receipt of the report, the Commissioner is of the opinion that an application to the Tribunal is not warranted in the circumstances, he or she must dismiss the complaint.

…

qui ont exercé les représailles.

Exception

(2) Le commissaire ne peut demander au Tribunal d'ordonner la prise de sanctions disciplinaires visée à l'alinéa (1)b) à l'égard de la plainte dont le dépôt est autorisé par l'article 19.2.

Facteurs à considérer

(3) Dans l'exercice du pouvoir visé au paragraphe (1), le commissaire tient compte des facteurs suivants:

a) il y a des motifs raisonnables de croire que des représailles ont été exercées à l'égard du plaignant;

b) l'enquête relative à la plainte ne peut être terminée faute de collaboration d'un administrateur général ou de fonctionnaires;

c) la plainte doit être rejetée pour l'un des motifs énoncés aux alinéas 19.3(1)a) à d);

d) il est dans l'intérêt public de présenter une demande au Tribunal compte tenu des circonstances relatives à la plainte.

Rejet de la plainte

20.5 Si, après réception du rapport d'enquête, le commissaire est d'avis, compte tenu des circonstances relatives à la plainte, que l'instruction de celle-ci par le Tribunal n'est pas justifiée, il rejette la plainte.

[…]

Powers

21.2 (1) The member or panel may

(a) in the same manner and to the same extent as a superior court of record, summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath and to produce any documents and things that the member or panel considers necessary for the full hearing and consideration of the application;

(b) administer oaths;

(c) subject to subsection (2), receive and accept any evidence and other information, whether on oath or by affidavit or otherwise, that the member or panel sees fit, whether or not that evidence or information is or would be admissible in a court of law;

(d) lengthen or shorten any time limit established by the rules of procedure; and

(e) decide any procedural or evidentiary question.

Determination — paragraph 20.4(1)(a)

21.4 (1) On application made by the Commissioner for an order referred to in paragraph 20.4(1)(a) the Tribunal must determine whether the complainant has been subject to a reprisal and, if it so determines, the Tribunal may make an order granting a remedy to the complainant.

Parties

Pouvoirs

21.2 (1) Le membre instructeur ou la formation collégiale a le pouvoir:

a) d'assigner et de contraindre les témoins à comparaître, à déposer verbalement ou par écrit sous la foi du serment et à produire les pièces qu'il juge indispensables à l'examen complet de la demande, au même titre qu'une cour supérieure d'archives;

b) de faire prêter serment;

c) de recevoir, sous réserve du paragraphe (2), des éléments de preuve ou des renseignements par déclaration verbale ou écrite sous serment ou par tout autre moyen qu'il estime indiqué, indépendamment de leur admissibilité devant un tribunal judiciaire;

d) de modifier les délais prévus par les règles de pratique;

e) de trancher toute question de procédure ou de preuve.

Décision : alinéa 20.4(1)a)

21.4 (1) S'agissant d'une demande visant la prise de l'ordonnance prévue à l'alinéa 20.4(1)a), le Tribunal décide si des représailles ont été exercées à l'égard du plaignant et, s'il décide qu'elles l'ont été, peut ordonner la prise de mesures de réparation à l'égard du plaignant.

Parties

(2) The parties in respect of the application are the Commissioner and

(a) the complainant;

(b) if the complainant is a public servant, the complainant's employer; and

(c) if the complainant is a former public servant, the person or entity who was the complainant's employer at the time the alleged reprisal was taken.

…

Determination — paragraph 20.4(1)(b)

21.5 (1) On application made by the Commissioner for the orders referred to in paragraph 20.4(1)(b) the Tribunal must determine whether the complainant has been subject to a reprisal and whether the person or persons identified by the Commissioner in the application as having taken the alleged reprisal actually took it. If it determines that a reprisal was taken, the Tribunal may, regardless of whether or not it has determined that the reprisal was taken by the person or persons named in the application, make an order granting a remedy to the complainant.

Parties

(2) The parties in respect of proceedings held for the purpose of subsection (1) are the Commissioner and

(a) the complainant;

(b) if the complainant is a public

(2) Outre le commissaire, sont parties à la procédure :

a) le plaignant;

b) s'agissant d'un fonctionnaire, son employeur;

c) s'agissant d'un ancien fonctionnaire, la personne ou l'entité qui était son employeur à l'époque où des représailles auraient été exercées.

[…]

Décision : alinéa 20.4(1)b)

21.5 (1) S'agissant d'une demande visant la prise des ordonnances prévues à l'alinéa 20.4(1)b), le Tribunal décide si des représailles ont été exercées à l'égard du plaignant et si la personne ou les personnes identifiées dans la demande comme étant celles qui les auraient exercées les ont effectivement exercées. S'il décide que des représailles ont été exercées, le Tribunal peut ordonner — indépendamment de la question de savoir si ces personnes ont exercé les représailles — la prise de mesures de réparation à l'égard du plaignant.

Parties

(2) Outre le commissaire, sont parties à la procédure:

a) le plaignant;

b) s'agissant d'un fonctionnaire, son

servant, the complainant's employer;

(c) if the complainant is a former public servant, the person or entity who was the complainant's employer at the time the alleged reprisal was taken; and

(d) the person or persons identified in the application as being the person or persons who may have taken the alleged reprisal.

…

Rights of the parties

21.6(1) Every party must be given a full and ample opportunity to participate at any proceedings before the Tribunal — including, but not limited to, by appearing at any hearing, by presenting evidence and by making representations — and to be assisted or represented by counsel, or by any person, for that purpose.

Duty of Commissioner

(2) The Commissioner must, in proceedings before the Tribunal, adopt the position that, in his or her opinion, is in the public interest having regard to the nature of the complaint.

employeur;

c) s'agissant d'un ancien fonctionnaire, la personne ou l'entité qui était son employeur à l'époque où les représailles auraient été exercées;

d) la personne ou les personnes identifiées dans la demande comme étant celles qui auraient exercé les représailles.

[…]

Droits des parties

21.6 (1) Dans le cadre de toute procédure, il est donné aux parties la possibilité pleine et entière d'y prendre part et de se faire représenter à cette fin par un conseiller juridique ou par toute autre personne, et notamment de comparaître et de présenter des éléments de preuve ainsi que leurs observations.

Obligation du commissaire

(2) Dans le cadre de toute procédure, le commissaire adopte l'attitude qui, à son avis, est dans l'intérêt public, compte tenu de la nature de la plainte.

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-289-15
(APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAME JUSTICE ST-LOUIS DATED MAY 29, 2015, DOCKET NO. T-1553-13.)	
STYLE OF CAUSE:	CHARBEL EL-HELOU v. COURTS ADMINISTRATION SERVICE, LAURENT FRANCOEUR, FRANCINE COTÉ, ERIC CLOUTIER, DAVID POWER, AND ÉRIC DELAGE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 28, 2016
REASONS FOR JUDGMENT BY:	NOËL C.J.
CONCURRED IN BY:	STRATAS J.A. NEAR J.A.
DATED:	NOVEMBER 10, 2016

APPEARANCES:

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